



June 9, 2005

Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Food Marketing to Kids Workshop – Comment, P034519

Dear Secretary Clark:

The Promotion Marketing Association (“PMA”) is pleased to provide its comments for the Federal Trade Commission (“FTC”) and Department of Health and Human Service (“HHS”) Public Workshop on Marketing, Self-Regulation and Childhood Obesity. As the leading trade association representing the promotion marketing industry since 1911, the PMA has considerable experience and unique insight regarding marketing to children. The PMA represents members who have the ability to communicate to children through traditional and non-traditional marketing techniques that are highly attractive to them, such as television, radio and print advertisements, sweepstakes, contests, and rebate promotions.

The PMA’s approximately 650 members comprise a broad cross-section of the marketing industry, including Fortune 500 consumer goods and services companies, advertising and promotion agencies, retailers, suppliers, law firms and university faculty who educate about promotional activities as part of a business curriculum. The PMA’s mission is to encourage the highest standards of excellence in promotion marketing. The objectives of the PMA are to educate its members on the laws that govern promotions and to act as a resource to state legislatures, state attorneys general, and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive

marketing and promotion practices. The PMA represents numerous members whose promotional campaigns are designed to ensure that the advertising messages are delivered in a manner that is easily understandable to and appropriate to the children to whom such communications are made.

We broadly support the goal of responsible marketing towards children and we applaud the FTC's and HHS's interest in gathering information regarding this important topic. As set forth below, however, we urge the agencies to decline the invitation to adopt more restrictive policies or regulations regarding food advertising to children. The industry is comprised largely of highly responsible marketers who are sensitive to the issues being raised by the FTC and HHS, and who have adopted self-regulatory measures that go well beyond what the law already requires. Although the PMA's members all share the desire to curb childhood obesity, there is no reason to believe that federal regulation restricting the amount or content of advertising to children will help accomplish this goal. Such restrictive measures will, thus, have an unnecessary chilling effect on legitimate and appropriate advertising campaigns without any indication that such measures will achieve the intended goal.

1. Self-Regulation is Working to Ensure that Only Responsible Marketing to Children Occurs.

The advertising and promotions industry has long been at the forefront of industry self-regulation, operating a variety of highly respected self-regulatory bodies that have been widely praised by industry, the media, and the FTC itself. At the forefront of these efforts for children's advertising issues sits the Children's Advertising Review Unit ("CARU") and its companion entities, the National Advertising Division ("NAD") and the National Advertising Review Board ("NARB"). These self-regulatory bodies were created by the advertising community itself, through the National Advertising Review Council ("NARC"). In the words of former FTC Chairman Bob Pitofsky, "This group has proven the skeptics wrong. This is the best example of self-regulation that I am aware of in American history."

Few other industries can point to an independent unit such as CARU, which has a mandate to review the truth, accuracy and appropriateness of advertising through compliance with the industry's own self-regulatory guidelines. CARU maintains a staff of three attorneys and three advertising review specialists, supported by input from academic advisors, including children's psychologists, nutritionists and educational specialists. In addition to inquiries brought to it by consumers and industry members, CARU itself systematically monitors advertising and commences inquiries on its own accord.

The touchstone of CARU's review, which PMA supports, is ensuring that advertising to children does not mislead them, including advertising about the nutritional qualities of food products. CARU goes beyond this evaluation and reviews advertising to ensure that the "representations of food products. . . be made so as to encourage sound use of the product with a view towards healthy development of the child and development of good nutritional practices." This broad mandate empowers CARU to review any and all advertising and promotional activities directed towards children with a view towards how those advertisements and promotions might fit within the overall social, physical and psychological development of children. The effectiveness of CARU is evidenced by its 95% success rate in resolving issues regarding advertising to children.¹

Importantly, CARU is not the only entity screening advertising and promotions to children. For example, each of the major broadcast television networks maintain their own rigorous advertising review process, which include specific guidelines directed towards ensuring the appropriateness of children's advertising. The Electronic Retailers Association ("ERA") has also implemented guidelines and its own self-regulatory process for online promotions.

Advertisers themselves long have had internal screening mechanisms to weed out unfair or deceptive advertising to children. They are acutely aware of the need to communicate responsibly with children, and are, in the great majority of instances, their own strongest critics.

For example, the Ad Council has been meeting with large food marketers to discuss the best ways for them to keep their messages on foods and health consistent. The Ad Council has said it will work with companies to come up with a list of health goals they could individually promote, which would allow clearer review later of their success.

Representatives from Kellogg and Kraft told attendees at the AAF Conference in Nashville just this week that they are each doing much to address childhood obesity. Kraft, for example, has eliminated school advertising aimed at younger children, banned advertising at all to children under age 6, and shifted the mix of what it advertises to 6- to 11-year-olds. Kraft has also taken steps to alter products by reducing fats and offer healthier kinds of products. Kellogg has established a new internal code to foster improved visuals in their ads, for example, depicting people in ads exercising and eating reasonable portions of Kellogg products.

¹ National Advertising Review Council, *Guidance For Food Advertising Self-Regulation* 25 (2004).

The PMA itself has been active in educating its membership regarding appropriate advertising and promotional methods for children. All of PMA's members must pledge compliance with the PMA's Code of Ethics to ensure fair, honest and legal promotion marketing. The PMA expends significant resources in educating its members, and other interested persons, on the laws and standards that govern responsible promotion. It also acts as a resource to state legislatures, state attorneys general, and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive marketing and promotion practices.

As part of its educational objective, the PMA arranges and offers numerous conferences and seminars and provides its members with access to a variety of educational resources. For example, every year, the PMA sponsors a two-day, heavily-attended law conference, including seminars on regulatory issues, with speakers from a variety of governmental and self-regulatory agencies to directly educate PMA's members. Similarly, the PMA sponsored an entire program dedicated to marketing to children well before the concerns of marketing to children and obesity hit the major media. In June 2003, PMA's program, entitled "Kids Marketing," educated PMA members and others regarding techniques and children, including marketing food products to children. The principal speaker was Elizabeth Lascoutx, director of CARU. In 2003 and 2004, PMA sponsored expert roundtables at its annual conference on the subject of responsible advertising to children. The 2005 Law Conference, to be held on December 1 and 2, has a major session planned on exactly the subject of this FTC/HHS workshop.

The PMA's monthly law bulletin to members is also an important educational resource for its 650 members. The Bulletin has carried about a dozen stories over the last three years regarding the marketing of foods to children, and reporting on federal enforcement against misleading or unfair advertising of food and nutritional products.

Quite simply, self-regulation works. It has been effective at stemming consumer abuse and ensuring the dissemination of truthful and accurate advertising for over twenty years.

2. Imposing Further Restrictions on Marketing to Children Will Not Reduce Obesity Among Children.

Reputable nutritional and health experts agree that the causes of obesity are multifaceted. Overeating has complex physiological and behavioral underpinnings. There is no evidence of which we are aware that marketing or promotional activity to children causes obesity. Indeed, substantial evidence suggests that it does not.

Since any degree of weight gain is a function of energy intake versus energy expenditure, it is important to bear in mind that the undisputed decline in children's physical activity levels is directly, and perhaps primarily, correlated with the rising trend in obesity. Children are less active than they were twenty years ago for many reasons, including cuts in school physical fitness programs; increased "suburbanization" and reliance on cars; family and societal changes (two working parents); and increased access to television, computers, video games, and other passive forms of entertainment. Likewise, children eat more for many reasons, including increased portion sizes and more snacking opportunities (as a consequence of an increasingly sedentary lifestyle).

To the extent that advertising and promotion can be implicated in this trend, the operative hypothesis would be that child-directed advertising and promotion for food products cause children to consume either an increasingly unhealthy mix of foods or more food than is nutritionally appropriate for them. The evidence refuting this hypothesis includes the following:

- According to Nielsen Media Research, the number of commercials viewed each day by an average child has slightly declined, over the last ten years. These data also show a decline in inflation adjusted expenditures for food and restaurant advertising as a whole over the same period. It is common knowledge in the advertising industry, moreover, that the effectiveness of television advertising has declined, with the availability of more channels, DVDs, digital video recorders, and other media choices.
- There is no evidence that the amount of advertising of food products to children has shifted over the last decade. In fact, ad composition has remained remarkably stable since the 1970s. At the same time, obesity has been on a steady rise among children.
- Internationally, it is apparent that countries that have entirely banned advertising to children, such as Sweden and Quebec, fare no better in rising trends of pediatric obesity, and indeed, may perform worse on this score than countries, which permit such advertising, such as the Netherlands.²
- Adult obesity is increasing at a faster rate than childhood obesity.

² Advertising Federation Forum, 2005 (quoted from ANA presentation, May 2005).

We are aware that attention has been specifically directed by certain public interest advocates at so-called “advergaming,” that is, online or other games directed to children that contain some product or branding message. While a convenient target of critics, there is no reason to believe this particular method of advertising is any more responsible for the problem than any other. As a matter of First Amendment jurisprudence, the government treads on very shaky ground in restricting one particular form of speech, however truthful, to further such a broadly defined regulatory goal. Such regulation must directly advance the government’s stated objective and be no more restrictive than necessary to achieve its intended purpose. *See, e.g., Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). We urge the agencies to reject inappropriate bans on particular advertising methods that may be unpopular with certain segments of the public interest community.

Conclusion

CARU and other self-regulatory bodies have successfully established and enforced guidelines for advertising to children, including the advertising of food products, for decades. The FTC already possesses ample authority under Section 5 of the FTC Act to regulate unfair and misleading advertising to children. Moreover, the marketing industry is widely cognizant of the practical reality of the threatening lawsuit environment in which they operate. Quite simply, most companies know that unfair or misleading promotional or advertising activity will be caught in one of at least three nets: the self-regulation net, the FTC (or state Attorney General) net, or the wide and ever growing net of consumer class action litigation. The PMA’s members already have very powerful legal incentives to advertise responsibly.

Above and beyond these legal incentives, the advertising and promotions industry shares the public’s desire to improve the health of our children, and to carry only responsible messages to them. The FTC and HHS plainly need not advocate broader or additional authority in this regard.

The PMA looks forward to helping the agencies, the industry and the public further explore the relationship, if any, between advertising practices and the unfortunate rise in childhood obesity. We would be happy to facilitate the gathering of further information from PMA members that might be of interest to the agencies on these important issues. Certainly, based on what we know today, no new regulations or restrictions on advertising are advisable.

Respectfully submitted,,

Edward M. Kabak, Esq.
Chief Legal Executive
Promotion Marketing Association, Inc.
257 Park Avenue South
New York, NY 10010-7304

cc: Claire Rosenzweig, CAE, President, PMA
Rick Murray, Chairman of the Board, PMA

OF COUNSEL TO PMA

Linda A. Goldstein
Christopher A. Cole
MANATT, PHELPS & PHILLIPS, LLP
7 Times Square
New York, NY 10036

Ronald R. Urbach
Allison Fitzpatrick
DAVIS & GILBERT LLP
1740 Broadway
New York, NY 10019